No. 82-2021

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BENEDICK A. MARSH,

Petitioner,

v.

CITY OF OAKLAND,
a Municipal Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief in Opposition to Petition for Certiorari

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit properly affirm the district court's judgment that, as to the instant case, the applicable statute of limitations for actions brought pursuant to 42 U.S.C.A. § 1983 (1981) was that provided by California Code of Civil Procedure Section 338(1) (Deering's Supp. 1983)?

2. Inasmuch as Petitioner could not possibly have amended his complaint to bring his claim within the three year limit, did the district court properly deny Petitioner's request for leave to amend, and in this regard, did the court of appeals correctly affirm the district court's judgment?

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STATEMENT OF THE CASE

This case originated in the United States District Court for the Northern District of California as Action No. C 82-1248 EFL when Petitioner there filed his complaint for damages for wrongful

taking of real property on March 30, 1982. That action was brought pursuant to 42 U.S.C. § 1983.

Respondent CITY OF OAKLAND moved the court, pursuant to Federal Rule of Civil Procedure 12(b)(6) to order the complaint dismissed for failure to state a claim upon which relief can be granted. The district court on May 21, 1982, granted Respondent's motion and dismissed the action. On June 1, 1982, judgment was ordered to be entered for Respondent, and judgment was duly entered on June 7, 1982.

Petitioner on June 18, 1982 filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit. That court affirmed the district court's judgment in a memorandum filed on March 31, 1983.

The property which gave rise to Petitioner's claim was considered in

Oakland City Council Resolution No. 55948, duly approved by the Council on October 26, 1976. That resolution empowered Respondent to acquire Petitioner's property by eminent domain. Respondent filed its complaint in condemnation on December 27, 1976. Default judgment in condemnation was ordered in the Superior Court of the State of California and duly entered on November 28, 1977. The superior court found that Petitioner had been served with process, and set the fair market value of Petitioner's property at $48,000. Final order of condemnation was ordered in that court on February 14, 1978, at which time Respondent had deposited $48,000 with the court.

Petitioner admits the above sequence of events concerning the disposition of his property, but denies receiving notice of the action until "the summer of 1978".

Petitioner's Brief at 6. It is undisputed that Petitioner had direct knowledge of Respondent's condemnation proceedings at that time.

SUMMARY OF ARGUMENT

The court of appeals rested its decision upon a firm body of case law which had determined that California Code of Civil Procedure Section 338(1) was properly applied to claims arising under 42 U.S.C. § 1983. Additionally, that court decided that Petitioner's request for leave to amend his complaint was properly denied, since the district court found that Petitioner was unable to cure the defective complaint.

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ARGUMENT

I

ABUNDANT PRECEDENT, AS WELL AS SOUND REASONING DICTATE THAT THE THREE YEAR LIMITATION OF ACTIONS PROVIDED BY CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 338(1) WAS CORRECTLY APPLIED TO PETITIONER'S CLAIM, BROUGHT PURSUANT TO 42 U.S.C. § 1983.

42 U.S.C. § 1983 does not contain a limitation of actions provision. In determing the timeliness of claims under the Civil Rights Act, then, federal courts look to appropriate state statutes of limitation. Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 495 (5th Cir. 1979). Specifically on point with the instant case regarding the correct California statute of limitations to be applied in actions brought pursuant to 42 U.S.C. § 1983 is Briley v. State of California, 564 F.2d 849 (9th Cir. 1977). In that case the Ninth Circuit unequivocally stated, "This court has held that

the applicable statute of limitations for actions brought in California under the Civil Rights Act is California Code of Civil Procedure Section 338(1), providing a three-year limitation period 'upon a liability created by statute'." Id. at 854 (citing Ney v. State of California, 439 F.2d 1285, 1287 (9th Cir. 1970)).

California Code of Civil Procedure Section 338(1) (Deering's Supp. 1983) is set forth below:

> § 338. [Statutory liability; Injury to property; Fraud or mistake; Bonds of public officials and notaries; Slander of title; False advertising; Pollution violations; Three years]
>
> Within three years:
>
> 1. An action upon a liability created by statute, other than a penalty or forfeiture.

It is well established that "the federal courts look to the state statute of limitations applicable to the most similar state cause of action." Briley

v. State of California, 564 F.2d 849, 854 (9th Cir. 1977). The only federally cognizable liability which could conceivably attach to Respondent for alleged wrongs concerning the disposition of Petitioner's property is that created by the federal statute, 42 U.S.C. § 1983. Sound reasoning and abundant precedent dictate that California Code of Civil Procedure Section 338(1) was properly applied in the instant case.

Even though state law fixes the time limitation for the filing of a claim, federal courts look to federal law for the time of accrual of a claim. "This federal rule establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977) (citing Young v. Clinchfield Railroad Company,

288 F.2d 499, 503 (4th Cir. 1961)). Petitioner certainly had reason to know about Respondent's eminent domain proceedings when service upon him was perfected on January 26, 1977; and there is no doubt that Petitioner actually knew of the City of Oakland's activities in "the summer of 1978". Petitioner's Brief at 6.

Petitioner's claim accrued, then, within the federal definition certainly no later than "the summer of 1978". His complaint was not filed in the district court until March 30, 1982, at which time the appropriate statutory period for bringing actions had run. A complaint which shows on its face that a claim was not filed within the statutory limit is properly subject to a motion to dismiss for failure to state a claim upon which relief can granted. Fed. R. Civ. P. 12(b)6; Rauch v. Day and Night Manufacturing Corporation, 576 F.2d 697, 702

(6th Cir. 1978). The district court below, therefore, was clearly within proper bounds in granting Respondent's motion to dismiss and in dismissing Petitioner's action on May 21, 1982. The court of appeals correctly affirmed the judgment of the lower court on March 31, 1983.

Petitioner suggests that the three year limitations period prescribed by California Code of Civil Procedure Section 338(1) is inadequate to protect his rights. He cites as support for this proposition Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977).

> When we select the state statute from the available candidates, we try to choose that statute which applies to those state actions that resemble our Section 1983 action and that are sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions.

Petitioner's Brief at 9.

It need only be noted that the state statute of limitations under attack in Shouse was a thirty day limitation, in contrast to the more generous three year limitation at issue in the instant case.

Petitioner intimates that the five year limitation provided by California Code of Civil Procedure Sections 336 (action for mesne profits of real property), and 318 (adverse possession) might be applicable to his case. In support of his argument that one of the above-referenced sections applies to the case at bar he cites Garden Water Corporation v. Fambrough, 245 Cal. App. 2d 324, 53 Cal. Rptr. 862 (1966), an inverse condemnation suit; Martin v. Western States Gas and Electric Co., 8 Cal. App. 2d 226, 47 P.2d 522 (1935), an action involving the taking of riparian rights; and Podesta v. Linden Irrigation District, 141 Cal. App. 2d 38, 296 P.2d 401 (1956), an action

concerning the taking of property. It must not be forgotten that Petitioner's present claim is recognized in federal courts solely through the reach of 42 U.S.C. § 1983. The state property suits which he cites and the state statutes of limitations relating to property upon which he so heavily relies are totally inapplicable to questions regarding the correct statute of limitations to apply in a civil rights action.

II

THE DISTRICT COURT, FINDING THAT PETITIONER COULD NOT POSSIBLY BRING HIS COMPLAINT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS, PROPERLY DENIED HIM LEAVE TO AMEND HIS COMPLAINT; AND, GIVEN THE ABSENCE OF CLEAR ERROR, THE COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT'S JUDGMENT.

In the hearing on Respondent's motion to dismiss for failure to state a claim upon which relief can be granted, the district court below on May 21, 1982

denied Petitioner's request for leave to amend his complaint. Appendix at A-9. Since Petitioner was unable to meet the court's invitation to offer explanation of how he might circumvent the three year statutory limitation, Appendix at A-8-9, the court properly denied Petitioner's request. Appendix at A-9. Petitioner's Brief at 13-14. Although Petitioner in his Brief at 15 relies upon Breier v. Northern California Bowling Proprietor's Association, 316 F.2d 787, 789 (9th Cir. 1963) as support for the maxim that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served...," he fails to mention that Breier went on to hold that "leave to amend should be allowed unless the complaint 'cannot under any conceivable state of facts be amended to state a claim'." Id. at 790 (citing Alexander v. Pacific Maritime

Association, 314 F.2d 690 (9th Cir. 1963)).

The district court upon direct inquiry of Petitioner determined that there existed no state of facts by which Petitioner could state a valid claim. Unless that finding of the trial court is clearly erroneous, Federal Rule of Civil Procedure 52(a) dictates that it shall not be set aside. The Supreme Court of the United States has held in Guzman v. Pichirilo, 369 U.S. 698, 702 (1962), that under the clearly erroneous rule "an appellate court cannot upset a trial court's factual findings unless it 'is left with the definite and firm conviction that a mistake has been committed'" (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

Respondent respectfully asserts that there is no perspective through which one can view the district court's action in

denying Petitioner's request for leave to amend which would lead one to the "definite and firm conviction" that the lower court was mistaken.

CONCLUSION

Respondent respectfully submits that the court of appeals and district court below, having based their judgments upon sound precedent which Petitioner has proved unable to undermine, correctly decided the case at bar. Respondent requests, therefore, that Petitioner's petition to this Court for Writ of Certiorari be denied.

DATED: July 7, 1983

Respectfully submitted,

RICHARD E. WINNIE, City Attorney
YVONNE GARCIA, Asst. City Attorney
PETER K. FINCK, Deputy City Attorney

By: _____
Attorneys for Defendant/Respondent
CITY OF OAKLAND

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE EUGENE LYNCH, JUDGE

BENEDICK A. MARSH, Plaintiff, v. CITY OF OAKLAND, a Municipal Corporation, Defendant.	)	C-82-1248 EFL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

May 21, 1982

Reported by:

Raymond Linkerman

APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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May 21, 1982

THE COURT: MARSH VERSUS CITY OF OAKLAND.

THE CLERK: CIVIL CASE 82-1248. Counsel state your appearances, please.

MR. FINCK: Peter Finck appearing on behalf of defendant CITY OF OAKLAND, and moving party.

MR. SEA: Donald Sea appearing for plaintiff BENEDICK MARSH.

THE COURT: Yes. Okay. Well, it's a question over which statute of limitations applies, whether it's a three year or five, and if it's three years, the motion for summary judgment will be granted; is that correct?

MR. FINCK: That's correct, your honor.

MR. SEA: Although if it's granted, your honor, I would like an opportunity to amend, because I think I can get some additional facts that will fit into the

situation, but --

THE COURT: You have the plaintiff?

MR. SEA: Pardon me?

THE COURT: You have the plaintiff?

MR. SEA: Yes, your honor.

THE COURT: Well, how do you --

MR. SEA: However, I'm urging that it's a five-year statute.

THE COURT: Seems to me it should be a three-year one. You're bringing it in federal court, under the federal statue, right? Otherwise you should be in state court. I mean your basis for being here is pursuant to a statute, and the statute -- statute of limitations in California is three years.

MR. SEA: But is this here by reason of a statute?

THE COURT: Well, clearly --

MR. SEA: I mean it's an inverse condemnation --

THE COURT: Well, if it's an inverse

condemnation, it should be over in the state court. You're here in the federal court on the basis that there's a -- under the federal statute, right? I mean if it's just a straight inverse condemnation, what's it doing in the federal court?

MR. SEA: Well, I mean the violation of the civil rights was based on an inverse condemnation.

THE COURT: I understand, but, nevertheless, you're contending that it's a violation of civil rights.

MR. SEA: Right.

THE COURT: But -- so that's a three-year statute in California. If it's just a straight inverse condemnation, why don't you go to the state court?

MR. SEA: Well, that's possible, but I --

THE COURT: I mean if I determine that it's a three-year statute, which I'm

inclined to do, how are you going to amend it to --

MR. SEA: Well, in the first place, the wife could be brought in because she's an incompetent.

THE COURT: I understand that, but what I'm saying is --

MR. SEA: That would --

THE COURT: -- on the face of it, the statue has tolled. Three-year statute has tolled, right?

MR. SEA: Also, the City did not take all of the land, in effect. I mean, there's still part of the land that's there.

THE COURT: But that's a suit you could bring in the state court. Still within the five-year statute.

MR. SEA: Yes, it would be.

MR. FINCK: Your honor, it's -- I can't really add much more. He did bring it under 42 U.S.C. Section 1983, and

that's clearly a -- a three-year statute of limitations.

As far as inverse condemnation, the whole thing started from a very formal procedurally correct eminent domain suit, and we have a -- a judgment signed by a judge --

THE COURT: That's not the point. The point is that it's a three-year or five-year statute, right?

MR. FINCK: Your honor, as far as I can tell by research under federal statute it's a three-year. I mean I just had a decision in the Ninth Circuit on the same type of case, where it's just three years.

MR. SEA: Of course, in that case -- I think you're either referring to the May case, was it?

MR. FINCK: The Briley and the Smith case.

MR. SEA: One of them was a prisoner

suing a chief of police for furnishing of fraudulent transcript.

THE COURT: The basis of the suit is the violation of civil rights?

Submitted?

MR. SEA: Submitted.

MR. FINCK: Yes, your honor.

THE COURT: I'll grant the motion to dismiss.

MR. SEA: May I have an opportunity to amend?

THE COURT: How are you going to amend when you're beyond the statute? I mean -- I mean my natural inclination is to say, fine, I'll let you amend, but how are you going to get it within the statute?

MR. SEA: I would like an opportunity, if I may.

THE COURT: I don't know how you'd do it. What do you have in mind?

MR. SEA: Well, first place, there's

an incompetency here that's involved. Here the service of process was on an incompetent person, and that also constituted service on the plaintiff in this action, because he was absent from the state.

THE COURT: All right. But then they properly served him by publication, right?

MR. SEA: I don't think so.

THE COURT: But, nevertheless, the three-year statute has run for you to be here in the federal court. So I don't see how you're going to be able to amend your complaint to -- to say anything different.

I'll grant the motion to dismiss. I'll grant it without leave to amend. I really think you belong in the state court, frankly. Okay.

MR. SEA: Thank you.

THE COURT: All right.

(PROCEEDINGS ADJOURNED.)

STATEMENT OF RICHARD E. WINNIE REGARDING THE FILING OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I, RICHARD E. WINNIE, state that forty (40) copies of Respondent CITY OF OAKLAND'S Brief in Opposition to Petition for Certiorari in the above-captioned action were on July 8, 1983 deposited in the United States Mailbox at 1421 Washington Street, Oakland, CA 94612, with first-class postage prepaid, addressed as follows:

ALEXANDER L. STEVAS
Clerk
Supreme Court of
the United States
Washington, D.C. 20543

Such mailing occurred within thirty (30) days of my receipt on June 10, 1983 of Petitioner's Petition for Writ of Certiorari, and met therefore the time limitation for Respondent's response

prescribed by United States Supreme Court

Rule 22.

RICHARD E. WINNIE

State of California)
)
County of Alameda) ss.

OFFICIAL SEAL
MICHELLE MARIE TAYLOR
NOTARY PUBLIC-CALIFORNIA
COUNTY OF ALAMEDA
My Commission Expires Apr. 5, 1985

Subscribed and sworn to before me

this 7th day of July, 1983

MICHELLE TAYLOR
Notary Public

CERTIFICATE OF SERVICE

I, RICHARD E. WINNIE, certify that I am counsel of record in the above-captioned action and that on July 8, 1983, I served on Petitioner three (3) copies of the foregoing Brief in Opposition to Petition for Certiorari by depositing them in the United States Mail at 1421 Washington Street, Oakland, CA 94612, first-class postage prepaid, addressed as follows:

FOR BENEDICK A. MARSH

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RICHARD E. WINNIE